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IN THE

Supreme Court of the United States

October Term, 1948

No. 457

GEORGE W. HUMPHREY, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*v.*—

BERNARD W. SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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INDEX.

	PAGE
I. Statement of Questions Involved	1
II. Statement of the Case	2
III. Argument	
1. The impartial and thorough investigation is jurisdictional	6
2. Todd was not an impartial investigator under A. W. 70	14
3. Statements were taken by Todd and Felton from Miriam Cullum and Sheila Dale on July 18th, at 7:45 P. M. at Raydon Aerodrome	22
4. The investigation under A. W. 70 was not thorough	24
5. The provisions of the Manual of Courts Martial were violated to the prejudice of the defendant	30
6. The identification parade was improperly conducted	31
7. There is a serious question as to whether a rape in fact occurred on Sheila Dale. The crime of rape had to be proven and conclusively established before anyone could be convicted	33
8. There was insufficient evidence to sustain a conviction in the case of Miriam Cullum	37
9. Smith conclusively proved he was in the Raydon Aerodrome at the time the alleged offense occurred	39
10. The Government theory of the law in the case was erroneous	42

11. Errors made by reviewing authorities 43
12. The Government has changed its theory in the case 47
13. The defendant was denied counsel 47
14. Judge Folmer's decision was predicated on erroneous statement of fact by the Government 48
15. Comments on Government's brief 50
16. The judgment of the Court of Appeals should be affirmed 52

Citations:

Anthony v. Hunter, 71 F. Sup. 823 ..... 6, 26
Benjamin v. Hunter, 162 F. 2d, 512 6
DeWar v. Hunter, — F. 2d — 7
Henry v. Hodges, 76 F. Sup. 968 7
Hicks v. Hiatt, 64 Fed. Sup. 238 ..... 6, 11, 26, 41
Johnson v. Zerbst, 304 U. S. 458, 467; 82 L. Ed. 1461, 58 S. Ct. 1019 48
Illinois L. R. Vol. 41 at 260 7
People v. Abbott, 19 Wendell 192 (N. Y.) 36
People v. Carey, 223 N. Y. 519 37
People v. Dohring, 59 N. Y. 374 at Page 383 37
People v. Morrison, 1 Parker Crim. Rpts. 625 36
Reilley v. Pescor, 156 F. 2d 632 7
Univ. of Chicago L. R. Vol. 13 at 494 7
U. S. v. Ross, 92 U. S. 281-283 47
Walker v. Johnson, 312 U. S. 275, 286; 88 L. Ed. 830; 61 S. Ct. 574 48
Waite v. Overlade, 164 F. 2d, 722; 334 U. S. 412 7
Williams v. Kaiser, 323 U. S. 476-477; 89 L. Ed., 65 S. Ct. 363 48

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Miscellaneous:

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24th Article of War 20
Court Martial 161728, Clark 7, 27
Court Martial 183183, Claybaugh 7, 27
Court Martial 299477, Floyd, 17 B. R. 149, 153 and 156 ..... 7, 8, 27
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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

I. Statement of Questions Involved.

1. The impartial investigator under A. W. 70 did not make a thorough and impartial investigation pursuant to A. W. 70 in that the investigation was not thorough, impartial or competently made.

2. The judgment of conviction of the defendant was against the weight of evidence and therefore error as a matter of law.

3. In trying the two cases together evidence in one case was added to evidence in the other case and a conviction in both cases resulted, whereas the conviction in either case on the evidence was insufficient as a matter of law.

II. Statement of the Case.

This action arises on the following charges:

1. Violation of A. W. 70—rape of Sheila Dale.

2. Violation of A. W. 93—"with intent to commit a felony, viz. rape. Committed an assault on Miriam Florence Cullum * * *."

The offenses were alleged to have been committed between 10:40 P. M. Tuesday, July 11, 1944, in the Cullum case, and in the Sheila Dale case, betwen 11:05 and 11:45 P. M. of that day. Each of the offenses took place in the same neighborhood, about five miles away from camp. The terrain was very hilly and upgrade from the scene of the offense to the camp (R. 208). Complaint was made to Constable Felton in the Cullum case 6 days later, on July 17th, when he called at her home. Complaint was made in the Dale case the next day, July 12th, about 10 A. M., when Dr. Beckett summoned the police, stating that the Dale girl consulted him complaining that she had been raped, that no contraceptive was used and she was worried lest she be pregnant. Neither girl nor their families called the police. On July 18th Constable Felton, a British police officer, called at the Rasden Aerodrome, and consulted with Lt. Todd, Provost Marshall, concerning the incident. He gave

a description of the assailant of the girls and thereupon Todd sent for a number of men who might be suspect. After nine men had been interviewed the defendant was summoned. The Collum girl claimed that when assaulted she bit her assailant's *right hand* near the thumb. No description of the bite was given. No mention was made as to whether blood was drawn or whether the bite caused a laceration. On interviewing the defendant in the presence of American officers, including Provost Marshall Todd who conducted the examination under A. W. 24, Constable Felton grabbed the defendant's hands and thereupon found a laceration of the *left* hand. The defendant stated that he had cut his hand with a cleaver opening cans of milk. Sgt. Pelletier, his superior, corroborated this explanation saying he saw blood running and dressed the wound. The defendant was arrested and confined to the guard house by Todd at 4 P. M. July 18. At 7:15 P. M. on July 18th a line-up was arranged by Todd wherein the defendant was identified by each girl. The defendant claims the line-up was conducted in a fraudulent manner. Constable Felton provided Todd prior to the line-up with a statement signed by the Dale girl dated July 17, 1944, and the Collum girl signed on July 17. Each girl supplemented her statement at the Bayeon Accident immediately after the line-up at 7:45 P. M. July 18 in Todd's office. Todd testified he *took a statement from Sheila Dale and she signed same and he authenticated same*. The only statement signed by Dale and authenticated by Todd is Ex. B (91-92). Todd testified the line-up was conducted about a week after he was appointed investigating officer. All Government witnesses testified the line-up took place within 4 hours after Todd first heard of the case and prior to July 19, 1944, the date of the charges. *The Government now admits Todd*

~~erred to his date.~~ (Page 19, Gov't Brief). Charges were signed by Capt. Ernest P. MacGregor. The impartial investigator, pursuant to Manual for Courts Martial could not legally be appointed prior to the signing of the charges. Todd knew of and testified to this. Todd conducted the line up and took the statements as Provost Marshall, then reported same to his superior officer. The superior officer appointed Todd as impartial investigator to determine the accuracy of the charges that Todd himself instigated. The actual appointment of Todd or the date of his appointment was missing from the Government records. Attorney for the defendant found same later at the date of argument of the appeal. Subsequent to his appointment as impartial investigator under A. W. 70 he again talked to the complainants, Dale and Cullum, and interviewed nine witnesses at the request of the defendant.

Todd made no investigation as to the reputation of either complainant as to chastity or virtue. He did not interrogate one Mrs. Kerry, who was with the complainant Cullum and the assailant and walked some distance with them immediately prior to the alleged assault, nor did he interrogate the policemen who passed them, the only disinterested witnesses re identity. Todd stated that Mrs. Kerry was not a necessary witness in that the defendant didn't request her testimony and the Government did not need her testimony. Smith testified at the hearing that Todd advised him not to have Mrs. Kerry called as a witness. Neither girl had any information concerning the assault on the other girl ~~prior to the meeting~~, so that the conviction in each case rested on the uncorroborated and unsupported testimony of each complainant. The defendant produced a witness who lived in the locality who testified that the Dale girl had a bad reputation for chastity. She was not

allowed to testify concerning the reputation of the Cullum girl. The physician called by Dale said he could not say a rape had occurred.

No physician was called by the Government to examine the defendant and ascertain whether the laceration on the defendant's hand was caused by a bite or a cleaver. A bite would cause two lacerations from the upper and lower teeth. There is evidence of only one laceration such as could have come from a cleaver. The scar was offered in evidence at Lewisburg and the Judge rejected the offer and refused to look at same (R. 26-27). The scar was a straight line scar (R. 15).

The defendant was represented on the trial by an air corps officer who was not a lawyer, although two men whom the Government claimed were lawyers sat in the trial as counsel. Neither participated in the trial. The Government was represented by two members of the Judge Advocate General's office, who were attorneys.

Six soldiers, including the sentry on the gate, testified the defendant was in camp at the time of the assault. The time of the assault, to wit: 11 to 11:45 P. M., fixed by Dale, was further corroborated by the fact that she couldn't ride her bicycle in that it had no lights and it was getting pretty dark (R. 133). The U. S. Nautical Almanac verifies this statement. English wartime was two hours faster than standard time.

On the trial Lt. Todd acted as Asst. Trial Judge Advocate.

The defendant was found guilty and sentenced to life imprisonment, which has been reduced to 12 years. He is now incarcerated in Lewisburg Penitentiary.

A rule permitting a writ of habeas corpus was filed by Honorable Frederick Follmer, U. S. District Judge. After a hearing the application for habeas corpus was denied. The Government included in the record before Judge Follmer C. I. D. reports which were not part of the trial and which the attorney for the petitioner was not permitted to see at the time on the ground they were confidential communications. Judge Follmer quoted from the C. I. D. reports in his opinion.

The defendant requested the Circuit Court to decide the case on the merits and did not ask for a technical reversal. The defendant calls the attention of the Court to the fact that the C. I. D. report is not a proper part of the case and is contained at Pages 79 to 82 of the record. This report was not before the court martial.

The District Court wrote an opinion denying the habeas corpus on August 7, 1947, from which decision the defendant appealed to the Court of Appeals for the Third Circuit. The case was argued April 8, 1948, and decided September 14, 1948, which decision reversed the District Court and directed the defendant be released from custody forthwith. From that decision the Government appeals.

1. The impartial and thorough investigation under A. W. 70 is jurisdictional

The courts have universally held or conceded that the thorough and impartial investigation is a jurisdictional requirement.

Hicks v. Hiatt, 64 F. Sup. 238;

Anthony v. Hunter, 71 F. Sup. 823;

Benjamin v. Hunter, 162 F. 2d 512;

Henry v. Hodges, 76 F. Sup. 968, reversed in that there was substantial compliance of A. W. 70;

University of Chicago Law Review No. 13 at 494;

Illinois Law Review No. 41 at 260;

Waite v. Overlade, 164 F. 2d 722, certiorari denied 334 U. S. 412;

DeWar v. Hunter, .. F. 2d .., decided 12/3/48;

Reilley v. Pescor, 156 F. 2d 632.

The Board of Review held as follows in 1924:

"* * * However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 76a, Manual for Courts-Martial, 1921, relating to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161728, Clark). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of the accused."

CM 299477, Floyd 17 Br 149, 153-156, decided February 2, 1943.

There is no court decision cited anywhere by the Government indicating that substantial compliance with A. W. 70 is not a jurisdictional necessity.

The Board of Review reports cited by the Government are not available to the defendant. The defendant is ad-

vised that the decision in the *Floyd* case, supra, wherein the Board of Review stated that A. W. 70 was not jurisdictional, cited by the Government, was in fact dicta. Under the Federal Constitution all persons are entitled to due process of law. A citizen in the United States Army is subject to court martial law in lieu of the civilian law. The law under the Articles of War is intended to give the defendant substantial justice, although same is somewhat streamlined. In that many of the protections afforded a civilian citizen are denied a soldier, the few safeguards given a soldier must be therefore more rigidly adhered to and respected.

* * * * *

Comparing the rights of a soldier and citizen, the following chart as to relative rights is submitted:

	Citizen	Soldier
1. Entitled to counsel at all stages of the proceeding	Yes	No
2. Prompt arraignment before a magistrate and be confronted by his accuser on an examination	Yes	No
3. To have case considered by grand jury	Yes	No
4. To be tried by an impartial jury of citizens	Yes	No
5. To subpoena witnesses and cross examine them[2]	Yes	No

[1] The soldier is only entitled to counsel at the court martial hearing. He is entitled to none at the A. W. 70 investigation (Government Brief, P. 20).

[2] The soldier can have witnesses "if available." There is no power of subpoena (Government Brief, P. 20).

6. To be tried before an impartial court which is not accountable to anyone for its decision Yes No

7. To argue appeals by counsel Yes No

The Government contends that A. W. 70 is for the guidance and benefit of the superiors only and that the defendant has no rights thereunder.

Hence a soldier is entitled to be tried by a group of officers appointed by their commander in lieu of the safeguards a citizen is entitled to as delineated above.

The Government offers little incentive to a citizen to become a member of the armed forces of the United States.

In addition to pledging his life if needs be in the defense of his country, as a matter of law the Government contends all rights under the Constitution are substantially denied him.

It has been held that soldiers or men in the armed forces are entitled to the fundamental protection of the Constitution. It is of utmost importance that every citizen, civilian or soldier, be entitled to reasonable safeguards to protect him from oppression and to preserve his dignity as a citizen. The soldier receives little by way of protection under the Court Martial Law as it now exists, conceding that the fair and impartial investigation under A. W. 70 is jurisdictional. If A. W. 70 is not jurisdictional the soldier is stripped of practically all rights.

The Government can not be serious in urging that A. W. 70 is not jurisdictional. The Government adopts inconsistent arguments in its brief.

"His (Todd's) investigation was sufficiently 'thorough' when he became convinced that, regardless of what else he might uncover by further investigation, he had no alternative than to recommend a general court-martial trial. No matter what Mrs. Kerry might have said to him—even if she were able positively to state that respondent was not the man who accosted her and Miss Cullum shortly before the attack on the latter—Todd still would have had to recommend trial in view of the evidence already in his possession. A 'thorough' investigation, therefore, did not require him to question Mrs. Kerry even against respondent's wishes." (Gov't Brief, P. 23.)

Todd as Provost Marshall was convinced of Smith's guilt at 4 o'clock in the afternoon on July 18th when he locked Smith in the guard house. The Government argues that under those facts an A. W. 70 was unnecessary—Todd already believed Smith guilty.

* * * * *

"He (Todd) was not required to convince himself beyond a reasonable doubt of respondent's guilt in order to recommend that he be brought to trial." (P. 33, Gov't Brief.)

Todd felt that Smith was guilty. Otherwise he wouldn't have locked him up. There was a reasonable doubt in Todd's mind as to his guilt which was resolved against the defendant.

"If she (Mrs. Kerry) was unable to identify him, her testimony would have been merely negative in character and hence could have had no influence one way or the other on Todd's decision to recommend trial." (P. 34.)

The Government concedes Todd was so prejudiced that if Miriam Cullum's testimony was disputed by Mrs. Kerry even that would not affect Todd's opinion re Smith's guilt. If Miriam Cullum was mistaken concerning her attacker perhaps the testimony of the woman of easy virtue, Sheila Dale, might have been attacked had Todd found out her reputation in the community or made inquiries of Kentucky as to whether or not she had had relations with Kentucky that evening. The Government urges that nothing could change Todd's mind. He learned nothing under A. W. 70 that he hadn't already learned under A. W. 24. Consequently he couldn't be impartial.

* * * * *

> "We do not, of course, contend that the provisions of A. W. 70 may be ignored by the military authorities. Nor do we contend that A. W. 70 confers no rights on an accused. On the contrary, we readily concede that A. W. 70 confers definite rights on an accused—rights, which he may insist upon before trial and at the trial, and concerning the deprivation of which he may complain, if necessary." (P. 50; Gov't Brief.)

The Government concedes that A. W. 70 can not be ignored. Does merely filling out mimeographed forms comply with A. W. 70 or should the words, "thorough and impartial" be construed in their normal meaning? Judge Briggs stated in *Hicks v. Hiatt* that an A. W. 70 investigation incompetently made was not thorough and impartial. If Smith was entitled, as the Government concedes, to the provisions of A. W. 70, then those provisions had to be carried out in a reasonable manner. When the Government concedes that evidence could not change Todd's mind con-

cerning Smith's guilt then the Government concedes that was impossible for Todd to be impartial.

Todd was convinced of Smith's guilt after the A. W 24 investigation. The Government argues that A. W. 70 while a right granted to the soldier was a naked right A naked right is no right.

Had an impartial person conducted the A. W. 70 investigation he would have been thorough and impartial. The Government admits Todd was biased when he began the A. W. 70 investigation as a result of his A. W. 24 investigation.

Smith was a private in the U. S. Army having been charged with an offense punishable by death. At that time he did not have counsel and was not entitled to any. Under A. W. 70 Lt. Todd was appointed as an impartial investigator. Todd was a lawyer and an officer. He shirked his duty to make a thorough investigation of the case by saying that he asked Smith as to whether he should interrogate Mrs. Kerry. Smith had no qualifications to determine whether or not that evidence was pertinent. It was Todd's duty, as impartial investigating officer to get all available evidence and in order to permit him (Todd) to decide on all the evidence as to whether to recommend the accused be brought to trial. Had Todd interrogated Mrs. Kerry or the policemen in the presence of the accused then the accused would have known as to whether or not to have had them subpoenaed for the trial. The accused didn't know whether Mrs. Kerry would identify him or not. Neither did Todd. The accused and the Government both were entitled to know what evidence was available, whether the evidence was beneficial or detrimental. Todd attempted to

shift his responsibility as investigator over to Smith. This was fundamentally wrong.

The War Department Technical Manual entitled "Military Justice Procedure" (TM 27-255), prescribed (Par. 41, p. 37):

> It is not the investigator's function to build up a case against the accused, but to ascertain and impartially weigh *all* facts in arriving at his final conclusions. He is required to conduct "a thorough and impartial investigation" (A. W. 70). All available evidence should be exhausted. The investigating officer is not limited to examination of the witnesses and documentary evidence indicated on the charge sheet; he should extend his investigation as far as may be necessary to make it thorough.

And the same manual further prescribes (Par. 42b, p. 38):

> b. At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, *and the names and substance of the testimony of all witnesses should be made known to him.* (Emphasis ours.)

Other errors.

A. W. 8 was violated. This was a jurisdictional error.

> * * * the authority appointing a general court martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department except when an officer of that department is not available for the purpose the appointing authority detail instead an officer of some

other branch of the service selected by the appointing authority as especially qualified to perform the duties of a law member * * *."

The members of the court were:

Col. Donald P. Graul, 017557, Sig C.
Lt. Col. Wesley W. Harting, 0485609, CE
Maj. Hugh B. Speir, 0485137, AC
Maj. Ceylon B. Frazer, 0512575, GSC Law Member
Maj. Charles T. Bruett, 0905620, AC
Maj. Noble H. Hodge, 0430731, AC
Capt. James C. Cope, 0419592, MC
Capt. John B. Rose, Jr., 024960, AC
Capt. William S. Woolsey, 0855845, AC

(P. 112)

None of the aforesaid members were members of the Judge Advocate General's Department. Yet Cap. Harley J. McNeal, 0914222, JAGD, (Judge Advocate General's Department) Trial Judge Advocate, was produced by the Government to prosecute the defendant. The law required a member of the Judge Advocate General's Office to be on the bench, and those in authority made a member of the Judge Advocate General's staff a prosecutor and thus deprived Smith of the benefit of a lawyer on the Court pursuant to A. W. 8. The defendant's rights were thus prejudiced.

2. Todd was not an impartial investigator under A. W. 70.

Lt. Todd was the Provost Marshall of the Raydon Aerodrome. At a hearing at Lewisburg Todd testified that the British constable first consulted him on July 18th, at 11 o'clock A. M. (R. 31). Eight or nine men had been brought before Todd and the British constable for questioning. At

3:30 P. M. the defendant was questioned by Todd and Felton for two hours (R. 200). Felton said to Smith: "Show me your hands" (R. 194). He was not advised that he was suspected of a serious offense. Felton saw a scab on the ball of the left thumb (R. 192). Smith said he was cut by a cleaver opening cans (R. 211). Smith was placed under arrest by Todd and confined to the guard-house at 4 P. M. "I took Smith's commanding officer into his cell" (R. 32). At 7:15 P. M. that day the identification parade was conducted by Todd (R. 32). Todd testified that Sheila Dale gave him a statement which she signed and he authenticated (P. 36). The only signed and authenticated statement of Sheila Dale is Exhibit B (P. 255, 256 and 257). Miriam Cullum said she gave a signed statement to Lt. Todd (P. 176). Both of these statements were taken at 7:45 P. M., July 18th, after the line-up. The Government now claims that Todd did not take the statements, although both he and the Cullum girl testified that he did take the statements. On July 19th, after Todd had made a report, Capt. Ernest P. MacGregor signed charges alleging that Smith violated the 92nd and 93rd Articles of War, on information and belief (R. 101). Todd was the accuser in fact and his charges were adopted by Capt. MacGregor. This was a violation of army regulations (Digest of Opinions of J. A. G. of the Army, Sec. 428, Page 293; Winthrop Military Law & Precedence, Vols. 1 and 2, Reprint of 1920, Pages 61, 2 and 3, Secs. 73 and 74). Todd testified that he was appointed impartial investigator some time prior to the line-up. The Government now admits that Todd was in error in this regard (R. 32). He could not have been appointed impartial investigator until after charges were filed and signed (35½ M. C. M.). The line-up was July 18th. The charges were dated and verified July 19th. The record discloses Todd was appointed A. W. 70

on July 20, 1944. Todd was appointed as impartial investigator to pass upon charges that he himself originated. He could not be impartial as a matter of law.

About a month previously Todd had a controversy with the defendant wherein he threatened the defendant (R. 42-43, 27, 31-32).

Todd first learned of the offense complained of herein when the British constable came to consult him as Provost Marshall of the Raydon Aerodrome, complaining that two British girls had been molested (R. 31). That was the first time Todd knew that anything of this type had happened. The British constables and Todd questioned 8 or 9 men between 11 A. M. and 3:30 P. M. on July 18th, prior to questioning Smith (R. 200). Todd said that both he and the British police questioned Smith (R. 32). Smith testified at Lewisburg that he was questioned by Todd and the British constables for about 2 hours. Todd put Smith in jail at the conclusion of the questioning. Todd said:

> "I took his commanding officer into his cell and asked Smith if he had any objection to any type of line-up and he said he had not." (R. 32.)

Smith was taken out of his cell to attend the identification parade which took place about 7:15 P. M. on July 18th (See Statements of Mirjam Cullum, Sheila Dale and Constable Felton, Exs. B, p. 1, 2, 3, 4 and 6.)

At the conclusion of the identification parade Smith was returned to his cell by Todd (R. 33).

At 7:45 P. M., July 18th, after the line-up, Todd took additional statements from Miriam Cullum, Sheila Dale and Constable Felton (Ex. B, p. 1, 2, 3, 4, 6 and R. 36, 176). The girls were in Todd's office (R. 17, 135); his office was in the guard house R. 13).

Todd was running the entire proceeding under A. W. 24. Smith testified at Lewisburg that Capt. MacGregor sent for him and said that Todd wanted him to appear before him with Capt. MacGregor (R. 13). The questioning, according to Todd, was done by him and the British constables (R. 32). It was MacGregor who actually signed the charges. *The fundamental error of the case is that no one was protecting Smith.* Todd testified he brought Capt. MacGregor to see Smith in jail so that *MacGregor could protect Smith's rights* (R. 32). All of this transpired on July 18th, prior to charges being filed.

Summary.

Todd as Provost Marshall under A. W. 24 (R. 33):

(1) Had MacGregor summon Smith to be questioned; (R. 13)

(2) Questioned the British constables and thereafter summoned Smith for the hearing; (R. 31-32)

(3) Had Smith before him once before on some other difficulty wherein Smith claimed Todd threatened him; (R. 12 and 27)

(4) With the British constables questioned Smith (R. 37) according to Smith for 2 hours; (R. 28-29-30)

(5) Had Smith confined to jail after the questioning (R. 32). He was in his cell (R. 74). Date of confinement July 18, 1944, 1600 hrs., or 4 P. M. (R. 74)

(6) Brought MacGregor to Smith's cell to inquire with regard to the line up, to protect him (R. 32).

(7) Arranged for the line up (R. 32).

(8) Took supplemental statements from Sheila Dale and Miriam Cullum, the complainant in each case. (R. 36).

(9) Had Smith returned to jail (R. 33).

(10) All these things happened July 18, 1944, two days prior to his appointment as impartial investigator under A. W. 70 (R. 99).

(11) Based on Todd's investigation as set forth above, on July 19th MacGregor, whom Todd called in to protect Smith, preferred the charges (R. 74-75-76) on information and belief.

(12) July 20th Todd was appointed impartial investigator under A. W. 70 (R. 99).

(13) TODD AT THE TIME OF THE APPOINTMENT HAD HAD SMITH IN JAIL FOR TWO DAYS.

(14) As a matter of law he could not be impartial.

No witness was called at the impartial investigation that added anything to the statements which were taken by Todd prior to his appointment as impartial investigator (See pre-trial investigating officer's report, R. 85 to 99).

Todd's impartial investigation consisted of going through certain motions to comply with A. W. 70. On July 24th, the date he filed that report, the only additional facts that he had acquired were: Pvt. William Vandergrift saw Sheila Dale crying at her home (R. 88) at about a quarter to 12.

Todd's entire investigation of the prosecution case consisted of examining the statements from the pocketbook of Constable Felton with whom Todd worked in this case, as well as taking supplemental statements with Felton after the line-up at 7:45 P. M. July 18th. A compilation of the statements is as follows:

Name of Witness	Date and Time of Statement	Page Appearing in Constable Felton's Book
Dr. Beckett	10:15 A. M. July 12	111-112
Sheila Dale	10:30 A. M. July 12	112-119
Ellen May Dale	3:30 P. M. July 12	122-125
Pamela Daley	11:00 A. M. July 13	125-129
Betty Goodall	12:15 P. M. July 13	129-130
Miriam Cullum	7:30 P. M. July 17	131-137
Frank Welham	7:30 P. M. July 17	138-139

Supplemental statements taken at Raydon Aerodrome by Todd and Felton in Todd's office on July 18th after the line-up:

Sheila Dale	7:45 P. M. July 18	141
Miriam Cullum	7:45 P. M. July 18	142

It will be noted that the dates and pages in the constable's book are consecutive. Todd admitted at the Lewisburg hearing that he took a statement from Sheila Dale which she signed and he authenticated (P. 36). It is true he claimed he did this as impartial investigator, but Todd was mistaken as to the time of the impartial investigation. He claimed his A. W. 70 investigation was a week after the line-up (P. 36). The Government claimed Todd was right until the record was actually produced showing that he was wrong. Now the Government admits Todd was wrong. If he was wrong concerning the date of the line-up he was wrong concerning the date of the statement. (Gov't Brief, Foothote 13 on Page 19) The only statement signed by Sheila Dale and authenticated by Todd appears at 255, 6 and 7. There is no other statement in the record anywhere signed by Dale and by Todd.

At the time Constable Felton first consulted with Todd on July 18th he had all those statements and presumably

turned the file over to Todd. Todd did not learn any single fact concerning this case after his appointment under A. W. 70 that he did not have in writing on July 18th, two days prior to his appointment.

All witnesses at the trial, and every person who made a written statement, stated the line up was July 18th at about 7:30 to 7:45 P. M. Todd denied this. Now the Government admits Todd's error (Brief on Certiorari, p. 9). No witnesses disputed the time. At Lewisburg Todd told how he arranged the line-up (R. 32). Concerning his actions immediately after the line-up he testified as follows:

> "Q. Subsequently was Smith brought into the Provost Marshall's Office?
>
> A. Smith was taken to his cell and his captain went along with me and I asked Smith if he thought the line-up was conducted in a fair manner, and he said it was but still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the line-up or I would bring the girls into the cell. *I was acting under the 24th Article of War.*" (R. 33.)

The 24th Article of War provides as follows:

> "ART. 24. *Compulsory Self-Incrimination Prohibited.*—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or *before any officer conducting an investigation*," shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate

him, or to answer any question not material to the issue when such answer might tend to degrade him. (* Emphasis supplied.)

Todd therefore admitted he was conducting an investigation. His only capacity to conduct the investigation at that time was as Provost Marshall. Todd was appointed impartial investigator under A. W. 70, July 20th. The charges were filed July 19th. He could not have been appointed impartial investigator prior to the filing of the charges (Sec. 30 M. C. M.). Todd therefore admitted by indirection that he was the accuser in fact and the impartial investigation provided by law under A. W. 70 was a farce.

Todd having conducted the inquisition under A. W. 24 stated:

"Q. Prior to the time of your having been appointed investigating officer under A. W. 70 had you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was of a perfectly fair mind. When I was appointed investigating officer I wanted to get at the truth of the matter." (R. 33.)

At that time Todd had Smith locked up in jail for two days.

The foregoing question and answer is so apparently erroneous or false it is unnecessary to discuss same.

* * * * *

Concerning Todd's explanation of the absence of Mrs. Kerry, the impartial witness, he stated as follows:

"So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I

asked Smith if he wanted her and he said 'no.'" (R. 35.)

Todd by that answer admitted that he was judging the case from the prosecution standpoint and Smith apparently was conducting his own defense. At one point he called in Capt. MacGregor to protect the defendant (R. 32).

3. Statements were taken by Todd and Felton from Miriam Cullum and Sheila Dale on July 18th at 7:45 P. M. at Raydon Aerodrome.

The Government denied the statements (P. 255 to 260) were taken by Todd. (Gov't Brief, P. 44.)

Judge McLaughlin in the prevailing opinion in the Court of Appeals commented on Todd's taking of the statements. The Government indicated Judge McLaughlin was mistaken. *Judge McLaughlin was not mistaken.* Todd admitted he took a statement from Sheila Dale and that at the end of the statement she signed it and he authenticated it. (P. 36.) Sheila Dale signed the statement at 7:45 P. M. July 18th at Raydon Aerodrome (P. 257-58). There is only *one* statement signed by Sheila Dale authenticated by Todd. There are other collateral facts which indicate that Todd was correct when he said he took the statement from Sheila Dale.

1. The statement was taken at 7:45 P. M. at Raydon Aerodrome (P. 30).

2. Miriam Cullum's statement was taken at the same time and place.

3. From examining the photostatic copies of the statements it is clear that both statements were typewritten at the same time.

4. The phraseology of the last two paragraphs of Sheila Dale's and Miriam Cullum's affidavits are almost identical in language.

5. The two girl complainants were brought to Raydon Aerodrome for the identification parade and Constable Felton testified that the girls were in Lt. Todd's office at the time the identification parade was held (P. 195).

6. Miriam Cullum went back to Todd's office when Shelia Dale came out to attend the identification parade (P. 195).

7. One of the girls testified at the trial that she gave the statement, Exhibit B, to Lt. Todd on July 18th. That statement was marked "Exhibit B." (R. 176.) Judge McLaughlin stated:

> "Exhibit B for the defense, referred to at the trial as the statement of Sheila Dale to Lt. Todd, appears to be the record of such interview." (P. 278.)

8. Smith testified at Lewisburg that the girls were in Todd's office prior to the line-up (P. 17). Todd's office was in the guard house (P. 13). Both girls were in Todd's office immediately prior to the line-up and were returned there after the line-up. Todd conducted the line-up (R. 32). Felton was present (P. 195). Each girl separately viewed the men in the line-up and returned to Todd's office (P. 195). Smith was originally interrogated in Todd's office by Todd and Felton (P. 33).

Todd admitted he was conducting an investigation under A. W. 24 (R. 33). If he were diligent and on the job he would have taken the statements himself from these girls after the line up. The British officers could not conduct Todd's A. W. 24 investigation. Todd's testimony in the record substantiates our contention.

The Government is now suggesting that Todd was as lax in conducting the A. W. 24 investigation as Smith contends he was lax in the conduct of the A. W. 70 investigation.

The Government never raised any question in this regard at any time in any of the courts below.

4. The investigation under A. W. 70 was not thorough.

(a) The thorough investigating officer made no investigation concerning the reputation of the complainants for chastity in the community in which they lived.

(b) Mrs. Kerry was the only disinterested witness re identity. She was not interviewed by the impartial investigator. No explanation is offered for such failure. Miriam Cullum, while walking with Mrs. Kerry, met her assailant. A conversation was carried on between the assailant, Cullum and Mrs. Kerry. They apparently walked some distance together (R. 164-165).

The defendant testified at the hearing that he requested Todd to question Mrs. Kerry and that Todd advised him that from a defense standpoint it would be advantageous to his case if Todd did not question Mrs. Kerry.

Todd testified as follows:

"Q. At the time you were interrogating various witnesses with respect to the matter did the name of Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her and any reason why she wasn't?

A. So far as from a prosecution standpoint it was not necessary. As far as from a defense stand-

point I asked Smith if he wanted her and he said 'no'."

The British policemen could have been interviewed (R. 171). They seemed to know the assailant. They spoke to him.

(c) Todd was not thorough by failing to have a doctor examine the laceration and give an expert opinion as to whether it was a bite or a cut. He was required to make a thorough and impartial investigation. He acted as a prosecutor in determining that "her testimony was not necessary from a prosecution standpoint." He was not thorough in that if the investigation was competently made he either knew or should have known that Mrs. Kerry's and the constables' testimony was of greatest importance.

No witness corroborates the Cullum girl's testimony at any point excepting that someone saw her crying after her alleged assault. She did not complain to the police or authorities until a week had elapsed. Prompt complaint of an assault or attack might be considered corroboration, but a complaint made a week later is no corroboration whatsoever.

Todd conducted the investigation in this case solely on the affidavits presented him by the British police officer when Todd was Provost Marshall. The one important witness, who was disinterested and who could identify the assailant of Miriam Cullum, was Mrs. Kerry. She never was interviewed by Todd.

Smith claimed at Lewisburg that Todd advised him not to call Mrs. Kerry on some theory, that it would be to Smith's advantage (R. 20).

Todd was a lawyer and either knew or should have known the law. He advised Smith not to call Mrs. Kerry. He did not do anything towards investigating the case subsequent to his appointment as impartial investigator.

As A. W. 70 investigator he merely approved his own findings and determination made when he was acting as Provost Marshall. That determination resulted in Smith being put in jail on the afternoon of July 18th at 1600 o'clock or 4 P. M. (R. 749).

Had he conducted a thorough examination he would have called a physician to determine whether the single laceration on Smith's hand was caused by a bite or a cut by a cleaver. Any physician could easily determine that. (See Dr. Murphy's affidavit filed with District Court.)

He made no investigation as to the character of the girls. The defendant was able to produce a reputable woman from the community who testified that Sheila Dale had a bad reputation. She started to testify that Miriam Culhun was also of a bad reputation. It was ruled out on an objection (R. 238). That information certainly was available to Todd had he elected to make such an investigation.

For these reasons the investigation was not thorough.

> "The investigation of the charge was not thorough in that it was not made competently." (*Hicks v. Hiatt*, 64 F. Supp. 238; *Anthony v. Hunter*, 71 F. Supp. 823.)
>
> "The thorough and impartial investigation under A. W. 70 is jurisdictional." (*Hicks v. Hiatt, supra; Anthony v. Hunter*, supra.)
>
> "* * * However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 70a, Manual for Court-Martial, 1921, relat-

ing to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161528, Clark). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of accused." (CM 299477 (*Floyd* 17 Br. 149, 153-156 (decided February 2, 1943.)

* * * * * *

"The course of administration involving action by one and the same officer as accuser and investigating officer in the same proceeding met with the disapproval of the Secretary of War." (Digest of Opinions of the J. A. G. 1912-1940, P. 293, Sec. 428.)

* * * * * *

"Investigation by Accuser. Several records of trial by general court martial received in the office of the Judge Advocate General indicated that some confusion existed in the service as to the requirements of A. W. 70 regarding the 'thorough and impartial investigation' of charges. The validity of the sentence in each of the cases covered by those records was brought into question by reason of the fact that the investigation conducted under the second paragraph of A. W. 70 has been made by the officer signing the charges under the oath prescribed by the first paragraph of that article. The course of administration thus disclosed, involving action by one and the same officer as accuser and as investigating officer in the

same proceeding, met with the disapproval of the Secretary of War.

Accordingly, under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. 250.45, Jan. 10, 1929." (Digest of Opinions of the Judge Advocate General of the Army, Section 428 at page 293.)

* * * * *

Construction of terms "accuser" and "prosecutor":

"As indicated by the use of the disjunctive 'or' these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations—*'accuser' is construed to mean either one who originates the charge or adopts and becomes responsible for it;* 'prosecutor' one who proposes or undertakes to have it tried and approved * * *

* * * *where having personally originated or adopted the charges,* he has preferred them as his own, or *caused them to be preferred nominally by another for him with the purpose of having them brought to trial he is in general properly the 'accuser'* even if he may occupy no hostile or adverse position towards the accused. So, if influenced by hostile feeling, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with, *he proposes upon assembling the court at-*

tively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution, appearing himself as a prosecuting witness, &c., he is properly to be deemed a 'prosecutor' within the meaning of this article, and it will not be legal for him to order the court, but the president must be resorted to for the purpose." (Winthrop's Military Law and Precedents, Vols. 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sections 73 and 74.) (Emphasis supplied.)

Mrs. Kerry and two policemen were the ONLY disinterested witnesses as to the identity of the assailant. There is no explanation as to the failure of the Government or the Court to call Mrs. Kerry or the policemen.

Mrs. Kerry was the only person other than the Dale and Cullum girls who saw the assailant at sufficiently close range to identify him. Miriam Cullum testified that she was just leaving Brantham about 20 minutes to 11 on July 11th with Mrs. Kerry (R. 164). Mrs. Kerry was walking and the Cullum girl was pushing her bicycle; that while so walking an American soldier came back and asked where they were going and Mrs. Kerry made some reply. He then asked if he could see them home and Mrs. Kerry said, "No, thanks." When they got to the Crown Public House "he was still walking along the side of us and asked us where we lived." Mrs. Kerry replied she lived at Brantham and they continued to walk on. When they got to a point between the two bridges the American moved off and asked if he could see us home and Mrs. Kerry said, "No, thanks." Then she said goodnight to me and I got on my bicycle and at the bridge he caught me up" (R. 165). The American referred to above was the assailant of Miriam

Cullum. Mrs. Kerry was the most important witness in the entire case had she been called. There is no explanation for the prosecution not producing Mrs. Kerry. When the prosecution failed the Court should have called Mrs. Kerry. The defendant according to his affidavit filed with the District Court stated that he wanted to see Mrs. Kerry and Todd advised him not to see her; that if he was not with Mrs. Kerry the night in question that then Mrs. Kerry could testify truthfully that she had never seen the defendant before in her life. The defendant was lulled into security, believing that she would be present at the trial and the prosecution double-crossed the defendant by not producing her as a witness.

The two special policemen who passed Mrs. Kerry, Miriam Cullum and her assailant could have testified as to the identity of the assailant (R. 171). As public officials and policemen they were readily available. The testimony indicates the policemen knew the assailant.

5. The provisions of the Manual of Courts Martial were violated to the prejudice of the defendant.

The defendant was ordered by his commanding officer, Capt. MacGregor, to report to him. The defendant inquired of Capt. MacGregor, the purpose of the summons and MacGregor replied: "Lt. Todd wants to see you, I don't know what he wants." Thereupon MacGregor escorted Smith to Todd's office. At Todd's office he was quizzed for three hours by Felton and Lt. Todd in Capt. MacGregor's presence. At one time during the quiz, the defendant refused to answer and the defendant turned to Capt. MacGregor and said, "Captain, am I required to answer these questions?" The Captain nodded to Lt. Todd and indicated

that the defendant should do as directed by Lt. Todd. Todd then told him to answer the questions as propounded by Colton or go to jail. "Command of a superior officer is presumed to be a lawful command." (Sec. 134-b, 64th A. W.) The punishment for wilfully disobeying a superior officer is: "1. Suffer death or such other punishment as a court martial may direct." (Article 64.) The defendant was not in a position to argue with his superiors.

Capt. MacGregor swore to the charges on information and belief (R. 117). He stated he had investigated the charges, but as a matter of fact the charges had been investigated by Lt. Todd and adopted by Capt. MacGregor.

> "An accuser or a prosecutor could not be a member of a court martial." (A. W. 8.)

By the same reasoning an investigator of the charges can not be the impartial investigator pursuant to Sec. 35, M. C. M., wherein he is directed to investigate "the truth of the matters set forth in the charges, form of charges and what disposition of the case should be made in the interest of justice and discipline."

6. The identification parade was improperly conducted.

Smith testified the C. I. D. man asked him if he wanted to change his position in line.

> "Before he had completed talking to me the other girl was brought out" (R. 216).

The second girl was brought out while the C. I. D. man was actually talking to Smith (R. 216). Smith testified Miriam Cullum was practically forced to go down the line to look at the men and she had her head half covered up

He said Sheila Dale walked down the line and had hysterics or something and one of the officers or C. I. D. men walked over to Smith and then Sheila Dale put her hand on him. He was not asked to show his teeth and Smith's hands were behind his back (R. 216). Constable Felton corroborates Smith as follows:

> "Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?
>
> A. I walked with her along the road and she picked out the man who assaulted * * *" (R. 194).

There is no contradiction of Smith's testimony in the record. Smith filed an affidavit with the District Court wherein he stated that the Dale and Cullum girls were kept in Todd's office prior to the line-up and that they could see the scene of the line-up through a window. Constable Felton answered this accusation as follows:

> "Q. Do you know whether or not from the offices of Lt. Todd anyone could see the soldiers line up in the parade?
>
> A. No, sir, they could not.
>
> Q. How do you know?
>
> A. You can't see out the windows, *NOT AT THE BOTTOM*" (R. 195).

The windows were hung in such a manner that they hinged from the bottom and Smith claimed in his affidavit that the girls could see the line-up over the top of the window.

The integrity and fairness of the line-up in view of Smith's accusations and the Government's failure to refute or even deny same is open to question. The defendant's affidavit contends that Constable Felton was alone with the

two girls in Todd's office prior to the line up, the inference being that Felton described the defendant to the girls.

7. There is a serious question as to whether a rape in fact occurred on Sheila Dale. The crime of rape had to be proven and conclusively established before anyone could be convicted.

She didn't report it to the authorities until she was being examined by a physician the next day to ascertain whether or not she was pregnant. Then the physician reported it to the authorities. The physician stated that she was not a virgin and that he could not testify that she had had intercourse recently. She was not bruised inside and she only had three bruises on her body—one on her right thigh, her left knee and left arm, which could have been caused by the bicycle fall (R. 178). There were no marks about her neck although she testified that he put his hands on her throat and told her if she didn't stop screaming he would murder her (R. 155). Her glasses were not knocked off and she said she struggled with him (R. 137). She didn't put up much of a fight. She said she kicked and struggled but the only thing she apparently accomplished was that she kicked off her knickers (R. 138). She didn't kick him in the groin because she thought it might injure him (R. 142). She said he was hurting her although she seemed to know that he did not put on any contraceptive (R. 142).

In fact, the examining physician testified:

> "Q. When this girl came to you did she come with a view to getting this 'prostigmine' test for pregnancy?
>
> A. No. She came claiming she had been raped by a man and no contraceptives were used and she was

worried about it in case she were pregnant." (R. 164).

Dr. Davidson testified there was semen on her knickers but there is no evidence as to where the semen came from and there is no evidence indicating whether or not she had relations with the boy she was out with previously that evening—"Kentucky." (R. 149). She was not even asked the question. Under the circumstances there is grave doubt as to whether or not she was actually ravished, considering her reputation in the community, her perfunctory defense and her failure to report the matter to the police; although she might have had intercourse that evening. Had the doctor not called the police for the purpose of protecting himself the matter probably never would have been reported to the authorities. There was ample time between midnight and 10 o'clock the next morning for her or her family to call the police before she went to the physician to ascertain whether or not she was pregnant.

Betty Goodall testified she heard a scream about 11 o'clock which was "ordinary," and there was no "fright in it" (R. 190). This was about a half hour before Sheila Dale was assaulted.

> "Mere verbal protestations and a pretence of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent. It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved but harder to be defended by the

guilty accused, though innocent." (1927 M MCM P. 165.).

The law of England provides as follows:

"In cases of rape and other sexual offenses against women, girls and boys, the jury may convict on the uncorroborated evidence of the prosecutrix or prosecutor but the judge should warn them that it is dangerous to do so.

The Court of Criminal Appeal may quash a conviction in the absence of an adequate warning (k) or if the evidence which is referred to by the judge as corroboration is not corroboration (l) or is doubtful. Evidence of a complaint made by a prosecutrix or prosecutor is not corroboration of her or his evidence since it lacks the essential quality of coming from an independent quarter."

Halsey's Law of England, Criminal Law & Procedure, 2nd Edition, Vol. IX, Part VI, Sec. 314.

"No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence. (*Penal Law of New York*, Sec. 2013.)

"If the commission of a sexual act becomes known the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. She has every selfish inducement to bring about a conviction, as every ground of acquittal, except possibly mistaken identity, would involve a reflection on her." (*Pittluauner, Consent in Rape*, (1925) 19 Ill. L. Rev. 419, 421.))

In *State of New York, Law Revision Commission Report, Recommendations and Studies*, 1937, Page 473, it is stated:

"The courts have always been cautious in dealing with these crimes and have been very reluctant to uphold convictions resting wholly upon the testimony of the prosecutrix. At an early date Sir Matthew Hale warned against the danger of such convictions and observed:

'* * * it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent; * * *'

and that we should:

'be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.' (1 Hale, P. C. 635-636.)"

Judge Cowan, writing for the Court of Appeals for the State of New York in *People v. Abbott*, 19 Wen 192, stated:

"Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. A mixed case will not do. The connection must be absolutely against her will. The People v. Morrison, 1 Parker Criminal Report 625, the Court stated: 'The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she

could kick and strike, teeth to bite and a voice to cry out; all of these should have been put in requisition in defense of her chastity." It therefore follows that a passive or perfunctory resistance was not enough. Her resistance had to be active in proportion to the outrage. *People v. Carey*, 223 N. Y. 519."

In *People v. Dohring*, 59 N. Y. 374, Page 383:

"Of course the phrase 'the utmost resistance' is a relative one and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another, but whatever the circumstances may be there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person. If she is conscious of what is attempted and has the possession of natural mental and physical powers in usual degree, and is not overawed by the number of assailants nor terrified by threats of death or the like, nor in such place and in such position as that resistance is useless. She must resist until exhausted or overpowered for a jury to find that it is against her will."

8. There was insufficient evidence to sustain a conviction in the case of Miriam Cullum.

She did not make a complaint to the police until a week had elapsed. At that time even Constable Pelton did not attach much significance to her claim until the "actual words" were added to her original version. At first she did not mention the "actual words." Someone either refreshed her recollection or suggested that her complaint would somehow aid Sheila Hale's case (R. 197). At the

time the complaint was made she told the Constable she bit her assailant. On the following day the Constable went to Raydon Aerodrome, and, as set forth, hereinabove, examined the hands of the 8 or 9 soldiers brought before him by Lt. Todd for examination. She said unequivocally that she bit the *right hand* (R. 259) of the defendant. Constable Felton effected his identification by means of the scab on the defendant's *left hand* (R. 193). At no point in her testimony did she describe the severity with which she bit her assailant. No mention is made as to whether or not blood was drawn. In the Raydon Aerodrome there must have been available physicians who could have easily noted the distinction between a bite, which is in fact a pinch or a squeeze, which would leave the imprints of the upper and lower teeth, and the laceration which was on the defendant's left hand and which was caused by a cleaver. This was a very important factor. From reading the testimony the Court must take judicial notice that the entire case hinged on the identification via the cut on the hand. The Government, rather than call a physician, relied on the lay testimony of Constable Felton that the cut on the defendant's hand could not have been made with a knife or cleaver. He made no examination of the teeth or appearance of the defendant as suggested by the complaints (R. 199) but merely relied on the cut on the hand. At that time Smith advised the Constable that he suffered the laceration from a cleaver (R. 199).

Sgt. Pelletier testified that he was present on That day at around 9:30 A. M. when Smith came to him with a cut on his hand; that at the time Smith said he got it while opening cans with a cleaver. He didn't actually see the accident but he knew what Smith was doing. He saw the blood running. He was his Chief Cook and superior officer

(R. 227), and Sgt. Pelletier dressed the cut for him (R. 229). Sgt. Pelletier stated that in opening cans with a cleaver a person was likely to get cut most anywhere (R. 230). A physician might have determined on July 18th not only whether the cut was from a cleaver or a bite, but he also might have been able to tell from the nature of the wound by examination as to whether or not it was five days or seven days old. This evidence in and of itself was sufficient to constitute a reasonable doubt as a matter of law.

The Court fell into error in combining the testimony of Sheila Dale and Miriam Cullum in such a manner so as to determine that the defendant was guilty in both cases, whereas in fact when the cases are severed and analyzed separately there is insufficient evidence in either case to warrant a conviction.

9. Smith conclusively proved he was in the Raydon Aerodrome at the time the alleged offense occurred.

Time was of greatest importance in establishing the defendant's alibi. Dale testified she left her assailant at 11:45; that she got home at 12 o'clock, about 5 minutes after she left her assailant (R. 144). In that she was corroborated by her sister, Pamela Dale (R. 158) and Pvt. Vandergriff (R. 162). In her statement, Exhibit B, page 3, she said she got indoors just after 12 o'clock. Her mother said she got home just after 12 o'clock (Exhibit B, page 5). She said it was dark enough so that she couldn't ride her bicycle without lights (R. 120); that it was getting pretty dark (R. 133). It took her 5 minutes to get home. Sunset was 10:19 British War Time. Twilight ended and full darkness began 50 minutes later, or 11:10 P. M. (Nautical Almanac for 1944 and British Meteorological Glossary, 3rd Ed.)

Court's Exhibit 1, the official passbook, indicated the defendant entered camp at 23 o'clock, which was the nearest hour to the time the defendant entered camp (R. 247). That book was kept to record the time the men check in (R. 248).

Defendant met Pvt. Angel Partyka, who was evidently a little intoxicated, and rode into camp with him without stopping, at about 11:30 (R. 219-220).

Harrison Wakeley, Government witness, sentry at the gate, saw the defendant enter the camp about 11:45 P. M. He was relieved from duty that night at 11:50 P. M. and he said it could have been a half hour before he left his post that Smith entered the camp (R. 219-220). That would be about 11:20. The sentry had a duty to ascertain to observe what was going on, to allow no one to pass without proper authority and to represent the commanding officer. (Basic Field Manual 193-194.) The Government having called this witness and vouched for his credibility, and which witness had the duty of observing what was going on, should have been bound by his testimony. If the Government doubted his credibility or accuracy they could have called the sentry who succeeded Wakeley on duty to ascertain as to whether or not Wakeley actually went off duty that night at 11:50 (R. 203). Sheila Dale and all of said complainant's witnesses were specific in stating that she got home at 12 o'clock and that it took 5 minutes to get from the scene of the offense to her home. If Wakeley actually saw the defendant entering camp some time prior to 10 minutes of 12, and considering it was five miles traveled up hill from the scene of the offense to the camp, the defendant could not have been the assailant.

Sgt. Pelletier was Smith's superior officer. He saw Smith shortly after the A. P. N. news bulletin, a U. S. Govern-

ment radio hookup in England. He saw the defendant enter shortly after 11 o'clock (R. 225-226). I recall the A. F. N. news [illegible] minutes later the B. B. C. came on" (R. 228). The A. F. N. news ended some time between 11 and 11:15 (R. 228) and the defendant came to the Sergeant's room less than 10 minutes after the A. F. N. went off the air (R. 226). The defendant requested the Court to take judicial notice the A. F. N. went off the air at 11:05 every night, which was refused. The T. J. A. refused to stipulate this fact although said information was readily available. The T. J. A.'s duties required him not to suppress evidence favorable to the defense and act inconsistent with a general desire to have the whole truth revealed (M. C. M. 41-d.) The Court ordinarily should have taken appropriate action with a view to obtaining such additional evidence as was necessary for such determination (M. C. M. Sec. 56, Page 58).

> "The defendant was entitled to be tried fairly." (*Hicks v. Hiatt*, supra.)

1st Sgt. Robert A. Hayes testified he saw the defendant at 11:30 to 11:45 in the kitchen mess hall (R. 231). He was positive as to his information (R. 232).

S Sgt. Edward R. LaPage said he saw the defendant in the mess hall between 11:45 and 11:30 (R. 233).

Sgt. Stanley T. Phelan saw Smith about 11:30 (R. 237).

The defendant was relying on an alibi. The complainants testified that he committed certain actions at a certain time. He conclusively demonstrated that he was not there at the time alleged. The reviewing authorities have indicated that the girls might have been mistaken concerning the time. If so, the testimony concerning the darkness as

taken from the official almanac is strong supporting evidence of the defendant's alibi.

Sheila Dale was characterized over the objection of the Government as a girl of bad reputation as to chastity (R. 238). Her testimony was accepted and the six soldiers' testimony was rejected. The Government accepted every statement made by Sheila Dale as being the absolute truth with the exception of her statement as to the time of the occurrence of the attack. On this they feel that she might be in error. That was the only subject which the defendant was able to attack. Having successfully controverted and defeated the issue of time the Government indicates that the time really was not of much consequence when, as a matter of fact, it was of tremendous importance.

10. The Government theory of the law in the case was erroneous.

The Government case started on the premise that the same person committed both crimes. Both cases were tried together with the same witnesses although they were two separate and distinct offenses, each one of which had to stand on its own facts. The evidence was intermingled to the point that the evidence was construed by the Court as cumulative and mutually corroborative. This was error. (Review of J. A. G., R. 51-52.)

Lt. Todd, as Provost Marshall, having convinced himself that the defendant was guilty and caused him to be committed to the guard house, made a report to his commanding officer concerning his findings. Of all the officers in the U. S. Army, only Lt. Todd was disqualified from being an impartial investigator. Todd admitted he had a dispute with Smith a short time previously (R. 31). The impartial

investigation was a matter of right, not a matter of convenience. Lt. Todd really made his investigation first as Provost Marshall, then using the same documents, papers and witnesses, made his report as impartial investigator.

Digest of Opinions of the J. A. G., supra;

Winthrop's Military Law and Precedents, supra.

11. Errors made by reviewing authorities.

Review of Staff Judge Advocate dated September 19, 1944. The first 3½ pages of this report are just a summary of the testimony of the two girl complainants. The reviewing authority did not miss any fact that would support the People's case. The testimony of 6 soldiers, including the sentry at the gate, was disposed of in 51 lines. "The record fully justifies the inference that she did not in fact consent" (R. 59-60). This statement is contrary to the evidence (Exhibit B, Pages 2, 3 and 4).

The record indicates that she did consent. She was not bruised or injured nor were her glasses knocked off.

The reviewing authorities attach great significance, as did Constable Felton and Lt. Todd, to the cut on the defendant's hand (R. 69).

> "There is also the corroborative circumstances of the scab from an incised wound on the accused's left hand at the spot where Miriam Cullum testified she bit him" (R. 69).

The accused explained this scab as resulting from a cut with a cleaver, but the Constable who examined it stated the scab was that from an incised wound rather than an abrasion or a cut. The word "incised" was used by the Trial Judge Advocate and Constable Felton. There was

never any mention of an abrasion. An incised wound is precisely the type of wound that would be caused by a cleaver. Webster's New International Dictionary defines "incised" as "to cut in or into with a sharp instrument, to carve, to engrave." That type of wound could not come from a bite with teeth. They also neglected the fact that she testified she hit his right hand, whereas the cut was on the left hand.

The defendant attempted to offer the scar of the wound in evidence at the hearing on the habeas corpus and the Trial Judge without examining the scar determined that it was not important and inadmissible. At the time of the hearing the scar could be seen as that of a straight line and a continuous cut (R. 26-27).

"The fact the attacks took place at the same place" (R. 69) was incompetent evidence and no proof against the defendant. The only emphasized point and underlined work in the entire review is the statement wherein Partyka, who was treated lightly, (the inference being that he was intoxicated at the time) stated that the defendant said he was with a girl that evening:

> "After he reached the station he was deliberately attempting to establish an alibi. In this connection it is to be noted that the accused testified he spoke to "all" the men in the mess hall that night and although his memory before 12 o'clock was exact he testified "there was no reason to remember the time after 12"" (R. 70).

The defendant was charged with two crimes which occurred between 10:45 and 11:45 P. M. He prepared his case on those grounds. He might not have been able to advise the Court as to where he was at any other given time

but as to the time of the alleged crime he made a detailed examination and preparation for the purpose of preparing his alibi. If it were necessary for him to establish where he was on any other occasions he should have been given the opportunity to prepare his defense.

> "The accused's conduct with respect to the gun on his hand two days later also suggested the purpose of establishing an alibi" (R. 70).

In that the reviewer is correct. An alibi if established is a complete and total defense. If he could prove he wasn't there and if he could further prove that the essence of the prosecutor's case, to wit: the lacerated hand, did not come from the bite of Miriam Culium, he should have been acquitted. However, the reviewer construes this undisputed testimony of Sgt. Pelletier and the defendant as being false merely because it conflicts with a desire to find the defendant guilty. The Sergeant testified he saw fresh blood running from the defendant's hand and dressed the would. No proof could be much more effective if it were true. Pelletier's credibility was not attacked.

The review of the branch office of the Judge Advocate General dated December 9, 1944.

> "Tall weeds had been broken down as if some person had been lying there" (R. 51).

There is no evidence in the case anywhere connecting up this evidence. This evidence was not binding on the defendant. Neither girl pointed out this spot to Constable Felton, according to the testimony in the case. It was not evidence and utterly irrelevant, immaterial and highly prejudicial.

"The time element in the two crimes complement each other and are in harmony" (R. 51).

This is no evidence against the defendant. This is one of the fundamental errors of the case. All prosecuting authorities construed both cases together, whereas each case had to rest on its own foundation. Perhaps the same man did commit both offenses. The defendant contends it was not he.

"The description given by Miriam of her assailant closely corresponds with the description given by Sheila" (R. 52).

These descriptions are of no value. Miriam Cullum identified the assailant as wearing an American uniform, riding a khaki colored bicycle and as the man who sat in the court room. The description of an American, wearing no stripes and riding a khaki colored bicycle could fit any enlisted man in the Army.

The J. A. G. Review stated: "Miriam bit her assailant on one of his hands (R. 53). R. 64 and 74 says "hand." Miriam's statement said "right hand" (Ex. B, Page 1). The wound was, in fact, on the left hand (R. 199). R. 75, referred to by the reviewer, was where they cross-examined Miriam as to the contradiction between her statement which said "right hand" and the fact, which was the left hand."

The J. A. G. erred in not appreciating the significance of Miriam's error. She bit a man on the right hand and because a man had a wound on the left hand he was convicted.

"The evidence is substantial and convincing that the same white American soldier committed the two crimes" (R. 51).

The following authorities have arrived at the above presumption by circumstantial evidence; they then erroneously concluded the presumption of the defendant was the assailant he committed [illegible]. This was error. U. S. v. Ross, 92 F. S. 261 (1950). Therefore, as a matter of law, the Judge Advocate General's Office has to a reversible error in the Review.

12. The Government has changed its theory in the case.

At the hearing at Lewisburg, Smith contended that the identification line-up was conducted by Todd on the evening of July 18th, four hours after he was first quizzed by Todd. Todd claimed that the line-up took place a week after July 18th, when he was acting as investigator under A. W. 70. The attorney for Smith requested in open court the date of the appointment of Todd as A. W. 70 investigator, and it was missing from the Government record (R. 36).

Counsel for Smith discovered the appointment while examining the record on the day of argument in the Court of Appeals, April 8, 1948. Todd was appointed investigator under A. W. 70 on July 20th, two days after the line-up was conducted and two days after he arrested Smith and took the last statement of the two complainants. The Government now admits substantially all of the defendant's contentions excepting they deny that Todd assisted or participated in the taking of the statements on July 18th at 7:45 after the line-up.

13. The defendant was denied counsel.

He was represented by an air corps officer. Two lawyers sat in as counsel, but they did not actively participate in

the case. The Government was represented by two members of the J. A. G. Staff, one of whom was the impartial investigator and Provost Marshall, Todd. The defendant was denied the protection afforded by the Constitution, which guaranteed him counsel, which meant competent counsel. This deprived him of his constitutional rights, especially in a case which involved the death penalty.

Johnson v. Zerbst, 304 U. S. 458, 467; 82 L. Ed. 1461, 58 S. Ct. 1019:

> "Petitioner, convicted and sentenced without the assistance of counsel, contends that he was ignorant of his right to counsel, and incapable of preserving his legal and constitutional rights during the trial. Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain a new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by habeas corpus."

Walker v. Johnston, 312 U. S. 275, 286; 88 L. Ed. 830; 61 S. Ct. 574;

Williams v. Kaiser, 323 U. S. 476 477; 89 L. Ed. 65 S. Ct. 363.

14. Judge Follmer's decision was predicated on an erroneous statement of fact by the Government.

The Government at Lewisburg advised the Court that

Thus could not find the date of Todd's appointment as an impartial investigator till Judge Follmer decided the case without knowing what day Todd was appointed impartial investigator. Counsel took the photostatic in Philadelphia on April 7th, the date of argument, before the Court of Appeals found Todd's appointment as impartial investigator at Page 31 of the photostatic record (R. 90a). The date of this appointment was of utmost importance. It conclusively established that Todd had performed all the acts in the preparation of this case prior to his appointment as impartial investigator. Judge Follmer decided the case adversely to the defendant, believing Todd's testimony, to wit: that practically all of Todd's investigation of this case was made subsequent to his appointment under A. W. 70 (R. 90b). In that the record conclusively demonstrates that Todd was wrong in that he made his investigation as Provost Marshall not under A. W. 70, Judge Follmer was estopped from giving a decision in favor of the defendant. Had Judge Follmer been given the date of the appointment it would have changed the entire law of the case and undoubtedly changed his decision. The Judge believed Todd and said he believed him. Yet Todd was wrong.

The defendant requested the Government to provide a photostatic copy of every paper in the file. This request was denied by the Government on the ground that such information was confidential. At the Law Hour hearing counsel for the defendant requested the date of the appointment in question (R. 90) and he was advised that the date of such appointment was not in the file. On April 7th, 1948, in Philadelphia counsel for the defendant himself found the document.

15. Comments on Government's brief.

The Government admitted a number of errors which are of the greatest importance.

1. They admit that Todd erred as to the date of his A. W. 70 appointment (Brief, p. 39). Yet Todd testified that he was positive concerning this point. Justice Fullmer said he believed Todd.

2. The Government claims that the Cadum girl erred in her testimony wherein she stated she gave Todd her statement (Exhibit B) (P. 45). The girl was testifying under oath. Either she was testifying to the truth or she wasn't. She knew to whom she gave statements. Todd never denied this.

3. On P. 44, Gov't Brief, the Government claimed that Todd did not take a statement from Sheila Dale. The record shows that Sheila Dale gave but one signed statement. Todd testified at Page 36 *he took a statement from Sheila Dale and that she signed it and he authenticated same.* There is only one statement in the record signed by Sheila Dale.

4. The Government states that an investigation was in progress for a week by the C. I. D. but they accomplished nothing. It was Todd who discovered the defendant, quizzed him, arrested him, identified him, acted as impartial investigator and then as trial judge advocate. The Government refers to Todd's actions in this case as "a harmless error" (P. 30, Gov't Brief).

> "Impartiality means something more than complete ignorance of a matter." (P. 46, Gov't Brief.)
>
> "The investigating officer, unlike the grand jury

does not guide the investigation. He notes investigate further unless else has made it." (P. 55.)

The fact that Todd participated briefly in the preliminary investigation and could tell the line-up which resulted in the respondent's identification [illegible] (P. 11.)

All the work done by Todd in this case was under A. W. 24. He admitted he had had trouble with Smith once before.

1. It was this A. W. 24 investigation that apprehended Smith.

2. Todd personally arrested Smith.

3. Todd arranged for the line-up of Smith. Talked with Smith in guard house with Capt. MacGregor. Told Irongha MacGregor to protect Smith *from above*" (R. 32).

4. Todd returned him to the guard house after the line-up.

5. Todd took the statements from the girls after the line-up.

6. He made a report under A. W. 24.

He was then appointed impartial investigator under A. W. 70.

Under A. W. 70 he didn't bother to investigate because he was convinced Smith was guilty. He recommended a court martial. He then acted as Trial Judge Advocate. Todd was not in this case *directly* nor were the *cases being tried* one was *to appear at the other*. Smith was sentenced to life imprisonment. Todd acted as policeman, committing investigator, grand jury and prosecutor.

Todd's actions in this case are not what Congress intended when it prescribed that a thorough and impartial investigation should precede the filing of charges in serious cases.

16. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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